SUPREME COURT, U. S.

FILED

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JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1119

UNITED STATES OF AMERICA, for the Use and Benefit of the TRANE COMPANY,

Petitioner,

against

[redacted], BENJAMIN GELMAN, doing business as GELCO BUILDERS, BURJAY CONSTRUCTION CORPORATION, NATIONAL SURETY CORPORATION AND THE HANOVER INSURANCE COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1968

No. .....

UNITED STATES OF AMERICA, FOR THE USE AND BENEFIT OF THE TRANE COMPANY,

Petitioner,

against

RAYMAR CONTRACTING CORP., BENJAMIN GELMAN, DOING BUSINESS AS GELCO BUILDERS, BURJAY CONSTRUCTION CORPORATION, NATIONAL SURETY CORPORATION AND THE HANOVER INSURANCE COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Trane Company prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on December 6, 1968.

Opinions Below

The opinion of the District Court (45a-50a)[1] is reported at —— F. Supp. ——. The opinion of the Circuit Court of Appeals and the dissenting opinion are reported at —— F. 2d ——, and are printed in Appendix annexed hereto at pages 14 through 19.

[1] References are to printed Appendix in the Court of Appeals.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on December 6, 1968. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Questions Presented

1. Whether a supplier of materials to a federal construction project can ratify a transaction by an agent and rely on the date thereof, so as to render its action timely under the one-year limitation provision of the Miller Act, where the supplier holds the agent out as one empowered to act for it, the agent pretends or purports to act for the supplier and the third party treats the transaction as one with the supplier, notwithstanding that the agent in fact was acting for his own account.

2. Whether the one-year limitation period under the Miller Act runs only once for each supplier commencing on the last day he supplied any material for work under the prime contract, instead of running from the last day he supplied material on each separate contract or order.

Statute Involved

The pertinent statutory provisions involved are 40 U.S.C. 270a-270b, printed in full in the appendix, *infra*, pp. 20-22. The limitation period set forth in Section 270b (b) thereof, provides as follows:

> "(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was

performed or material was supplied by him. The United States shall not be liable for this payment of any costs or expenses of any such suit. As amended Aug. 4, 1959, Pub. L, 86-135, § 1, 73 Stat. 279."

Statement of the Case

Petitioner, The Trane Company, instituted suit to recover a sum of money on a Miller Act (40 U.S.C. 270a) payment bond against the prime contractor, respondents Benjamin Gelman, doing business as Gelco Builders and Burjay Construction Corp., a joint venture (referred to as "Gelco-Burjay) and its sureties, respondents National Surety Corporation and The Hanover Insurance Company. Jurisdiction of the District Court was invoked under Section 270b of said Act. After trial without a jury, the District Court dismissed Trane's complaint and the Circuit Court of Appeals affirmed,[2] with one Judge dissenting.[3]

In March 1960, Gelco-Burjay contracted with the United States to install an air-conditioning system at two federal post office buildings. Gelco-Burjay subcontracted a portion of its contract to respondent Raymar Contracting Corp.,[4] including the furnishing and installation of certain air-conditioning equipment and electric motors needed to make said equipment operative. Raymar gave Jack Kleisrath, one of Trane's New York salesmen, a purchase order dated April 19, 1960 for the air-conditioning equipment which Trane thereupon supplied to the project through November 1, 1960. After billing Raymar for the agreed price of $39,703.05, Trane, on January 25, 1961, gave due notice of non-payment of said sum to Gelco-Burjay, and said sum remains unpaid.

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[2] Chief Judge Lumbard and Judge Hays.

[3] Judge Kaufman.

[4] Raymar Contracting Corp. defaulted by not appearing or pleading and is not involved herein.

On or about April 25, 1961, Raymar defaulted and Gelco-Burjay took over completion of Raymar's subcontract. About that time, Gelco-Burjay contacted Trane's New York office to inquire about the purchase of the electric motors and was referred by Trane's New York credit manager to Trane's employee, the same Jack Kleisrath who acted for Trane in the sale of the air-conditioning equipment to Raymar (32a-34a, 39a-41a).

Although Kleisrath's written agreement (Exhibit "D") with Trane limited his authority to Trane-manufactured products, Trane's employee testified that it was common practice for its salesmen and, in this case, Kleisrath, to purchase motors, freons and other items not manufactured by Trane from other manufacturers for shipment directly to the job site and to resell same to Trane's customers, in order to avoid large freight bills from Wisconsin to New York (19a, 21a, 29a), but the salesmen were required to notify Trane in Wisconsin of the transaction for billing and warranty purposes (22a). In this instance, Kleisrath did not so notify Trane in Wisconsin (22a), nor is there any evidence that he notified anyone in the New York office. The trial court, however, found that Kleisrath had no authority to order and resell the motors, but predicated Trane's claim only on its purported ratification of Kleisrath's actions (46a, 49a).

On April 28, 1961, Gelco-Burjay gave Kleisrath an oral order for electric motors without specifying the amount or type, assuming that Kleisrath knew the details because the motors had previously been ordered or negotiated by Raymar (33a). The motors, ordered by Kleisrath from General Dynamics Corporation, were delivered to the construction site and were billed to "Long Island Trane Service Co.", Syosset, N. Y., consigned to Raymar, with the last delivery occurring on July 10, 1961 (Exhibit "7", 33a). Kleisrath, with permission, not only worked for Trane out of Trane's New York City office but also out of his home in Syosset, Long Island. "Long Island Trane Service

Co." was a trade name filed by Kleisrath in the County Clerk's Office, Nassau County on April 26, 1961, just two days before the motor transaction, but Kleisrath was not authorized by Trane to form such a company, nor to conduct business for his own account. Trane, however, had a division called "The New York Trane Service Co." which was used to service its customers (28a).

On July 18, 1961, Kleisrath delivered invoices totalling $3,235.00 to Gelco-Burjay for the motors on a printed billhead captioned "The Trane Company", beneath which was typed "Long Island Trane Service Co., 88 Cold Spring Road, Syosset, Long Island, New York" (Exhibits "4" and "5"). The invoices directed payment to be made to the "Long Island Trane Service Co." Gelco-Burjay, knowing Kleisrath to be a sales representative of Trane, first made out the checks to "The Trane Company", but these were voided before delivery, and other checks were then issued to the "Long Island Trane Service Co." (43a). A receipt signed by Kleisrath stated that the motors were "billed to the account of Raymar . . ." (Exhibit "6"). Kleisrath endorsed the checks and converted the proceeds to his own use (30a). Trane did not learn about the sale of the motors until several months later. On December 5, 1961, Gelco-Burjay sent a letter to Trane complaining about the motors sold to them through Kleisrath, thus treating the motors transaction by Kleisrath as a Trane transaction (Exhibit "9", 11a, 43a).[5]

Petitioner instituted suit on June 26, 1962 to recover the purchase price for the air-conditioning equipment ($39,703.05) and the motors ($3,235.00).

The District Court seemingly accepted Trane's contention that it ratified the Kleisrath-negotiated motors contract, but held that Trane's claim for materials supplied to Raymar was time-barred because the judge interpreted

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[5] The letter said: "Remove and correct motors as per Trane Co. (Jack Kleisrath)."

the Miller Act as providing that the limitation period runs from the day the last material was supplied "on each separate contract." The judge found that the contract of April 1960 between Trane and Raymar where the last date of delivery was November 1, 1960, was separate from the contract of April 1961 between Trane and Gelco-Burjay where the last date of delivery was July 10, 1961, and as separate contracts, Trane's action for the recovery of $39,703.05 was untimely for the reason that it was not commenced within one year of the day the last material was supplied on that contract (47a). The court further held that the claim of $3,235.00 for the motors was extinguished by payment inasmuch as Trane's ratification of the contract of sale by Kleisrath must be affirmed in its entirety and Trane was therefore bound by the payment received and appropriated by its agent (49a).

The Circuit Court of Appeals, as represented by the view of the majority, held that Trane could not ratify the motors contract because Trane was "an utter stranger" to that transaction and therefore did not reach the question of the interpretation of the Miller Act limitation clause. The majority further agreed with the District Court that in any event Trane could not recover for the motors because even if Trane ratified, the ratification must include the receipt of payment.

In a dissenting opinion, one judge disagreed with the majority's treatment of the ratification issue and found, on the facts of the case, that since Kleisrath purported to act for Trane, Trane did in law and fact ratify the motors sale and therefore became the supplier of the motors. The dissenting judge disagreed entirely with the District Court's view of the Miller Act, and concluded that he would reverse on the claim for the air-conditioning equipment on the ground that there should be only one limitation period for each supplier on a job, commencing on the last day he supplied materials under the prime contract, which would be the July 10, 1961 date. He too was of the opinion that Trane could not collect for the

motors for the same reasons as both courts below. Petitioner concedes that it cannot collect for the motors.

Reasons for Granting the Writ

1. The Court of Appeals decided an important state question in conflict with applicable state law.

In actions brought under the Miller Act, state law has been uniformly applied by the Circuits to determine the substantive rights of the parties under their contract. *United States for the use and benefit of Shields, Inc.* v. *Citizens and Southern National Bank of Atlanta,* 367 F. 2d 473, 477 (4 Cir. 1966); *Central Steel Erection Co.* v. *Will,* 304 F. 2d 548, 554 (9 Cir. 1952). The law of New York, applicable herein, is settled that a principal may ratify the acts of his agent where the agent pretends or assumes to be acting for the principal. *Ramsey* v. *Miller,* 202 N. Y. 72; *Hamlin* v. *Sears,* 82 N. Y. 327; *Pickel* v. *Conn,* 209 App. Div. 410, 204 N.Y.S. 448; *Fellows* v. *Commissioners For Loaning United States Moneys,* 36 Barb. 655; Restatement, Agency, 2nd, § 85. The decision of the majority of the Court of Appeals herein turned mainly on a determination that the principal did not know of the transaction until months later[6] and that the agent in fact acted for his own account, but disregarded all the evidence leading to the conclusion that the agent purported or pretended to act for his principal.

The dissenting judge stated that he was "at a loss to understand the basis for the majority's conclusion that Trane was an 'utter stranger' to the contract between Gelco-Burjay and Kleisrath",[7] in view of the undisputed facts that Trane's New York office referred Kleisrath to Gelco-Burjay when they inquired about the motors and that Kleisrath used the name "Long Island Trane Service

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[6] Virtually every case of ratification involves after-acquired knowledge by the principal.

Company'' to give the obvious impression that he was acting for Trane. Neither the majority nor the dissenting judge commented on the most telling evidentiary facts that Kleisrath, on July 18, 1961, used Trane's billhead for his invoice to Gelco-Burjay, and that Gelco-Burjay by its letter dated December 5, 1961, treated the motors transaction as one having been entered into with Trane, both of which fortify the dissenting judge's conclusion that Kleisrath had purported to act for Trane.

Accordingly, it is submitted that the Court of Appeals' decision on the important question of ratification was not in accordance with New York Law.[8] Further, the error was so obvious and exceptional that it would be shockingly wrong to permit it to stand, and the impact on the petitioner, in having its entire claim wiped out, notwithstanding that it furnished materials of substantial benefit to the United States, would be unduly harsh and unjust.

2. The decision rendered in the District Court, although not reached in the Court of Appeals, involves an important question of federal law which has not been, but should be settled by this Court.

The Supreme Court has not yet interpreted the limitation provision of the Miller Act which was amended in 1959 to its present form, and since many millions of dollars are involved annually in federal construction projects, it is of vital interest to suppliers, laborers and subcontractors of the government and to the government itself, to have the question settled as to when suit must be commenced when

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[7] The majority incorrectly referred to the contract for motors as one between Gelco-Burjay and General Dynamics, although elsewhere they also referred to the same contract as one between Gelco-Burjay and Kleisrath.

[8] Neither of the courts below questioned the right of Trane to ratify by the commencement of suit. See *Hunderhun* v. *Cook*, 66 Barb. 21; *Dodge* v. *Lambert & Gardner*, 15 N. Y. Super. (2 Bosw.) 570; Restatement, Agency, 2nd § 97.

a supplier has more than one order or contract on a single project.

The question involved is novel and will remain in a state of confusion unless settled by the Supreme Court. In the only similar case, this Court recently denied certiorari where the Fifth Circuit Court of Appeals interpreted the Miller Act limitation provision as being plain and clear, reversing the District Court's decision which read into the limitation provision the words "for which claim is made". The Fifth Circuit held that the date of delivery of materials, although paid for, should be used as the measuring date to allow recovery for materials delivered prior thereto. *United States of America for the use and benefit of General Electric Co.* v. *Southern Construction Co. Inc. et al.*, 383 F. 2d 135 (5 Cir. 1967), cert. denied 390 U. S. 955 (1968).

The language in that decision appears to be in conflict with the interpretation of the statute by the District Court in the instant case in that the Court also read words into the statute, "under each separate contract" which do not appear therein. If this Court does not grant certiorari, the decision of the District Court will stand as a precedent which will affect all federal construction projects and will result in needless multiplicity of suits. As the dissenting judge in the Court of Appeals pointed out, "Piecemeal litigation is a plight to be avoided wherever feasible". The legislative history of the 1959 amendment to the Miller Act shows that Congress was trying to overcome complexities under the prior statute which the majority's view will only tend to perpetuate.[9]

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[9] In the pre-1959 Miller Act, a supplier had one year from the final settlement of the prime contract to commence suit and it did not matter how many different subcontracts or orders or contracts for materials there were. The 1959 amendment sought to relieve the Comptroller General of the responsibility for fixing the date on which the statute commences to run and also created uniformity of treatment as to each supplier, but there was no indication that Congress intended that a supplier should have multiple limitation periods under one prime contract. See 2 U. S. Code, Congressional and Administrative News (1959), pages 1995-1996.

The dissenting Court of Appeals judge in the instant case cited the General Electric case approvingly in concluding that the one-year limitation period should run only once for each supplier on a job, "commencing on the last day he supplied any material for work under the prime contract".

The question in this case prevails in several different combinations of contractual relationships between one supplier and (1) one or more subcontractors; (2) one subcontractor and the prime contractor; (3) one or more subcontractors and the prime contractor; (4) one subcontractor from whom the supplier receives two or more orders or contracts. In each case, the question will arise as to when the statute commences to run. Review by this Court of the instant case would settle the question of when the supplier must commence suit in all these other situations.

Conclusion

Petitioner submits that the important federal question posed herein as to the interpretation of the limitation period under the Miller Act should be resolved with finality by the Court at this time. It is of vital interest for all concerned with public construction contracts to know with certainty when suit must be instituted where one supplies materials to a single project under two or more contracts spread over several years. Since the error on the ratification issue conflicted with New York State law and was so obvious and exceptional, this Court should consider that question in order to reach the statutory one. To be thwarted in its effort to seek review of an important question of federal law by so palpable an error as is manifest in the court's treatment of the preliminary question of "ratification", the petitioner falls victim to a gross injustice in being denied the right to seek redress under the Miller Act.

Wherefore, petitioner respectfully prays that this Court issue a writ of certiorari to the United States Court of Appeals for the Second Circuit to review its judgment herein.

Respectfully submitted,

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APPENDIX A

Judgment of the United States Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of December, one thousand nine hundred and sixty-eight.

Present: HON. J. EDWARD LUMBARD,
Chief Judge,

HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS,
Circuit Judges.

UNITED STATES OF AMERICA, for the use and benefit of THE TRANE COMPANY,

Plaintiff-Appellant,

v.

RAYMAR CONTRACTING CORP., BENJAMIN GELMAN, doing business as GELCO BUILDERS, BURJAY CONSTRUCTION CORP., NATIONAL SURETY CORPORATION and THE HANOVER INSURANCE COMPANY,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to be taxed against appellant.

A. DANIEL FUSARO,
Clerk.

A true copy,

A. DANIEL FUSARO,
Clerk.

(SEAL)

APPENDIX B

Opinion of the United States Court of Appeals and Dissenting Opinion.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 146—September Term, 1968.

(Argued October 30, 1968 Decided December 6, 1968.)

Docket No. 32279

UNITED STATES OF AMERICA, for the use and benefit of THE TRANE COMPANY,

Plaintiff-Appellant,

—v.—

RAYMAR CONTRACTING CORP., BENJAMIN GELMAN, doing business as GELCO BUILDERS, BURJAY CONSTRUCTION CORPORATION, NATIONAL SURETY CORPORATION AND THE HANOVER INSURANCE COMPANY.

Defendants-Appellees.

Before:

LUMBARD, *Chief Judge,*

KAUFMAN and HAYS, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the Southern District of New York, Lloyd F. MacMahon, *Judge,* after a trial without a jury dismissing use plaintiff's complaint in a suit under the Miller Act, 40 U. S. C. §§ 270a-270d (1964), against a prime contractor and its sureties.

Affirmed.

IRVING RONALD STORCH (Schwartz, Weissberger, Leichter & Storch, New York, New York, Herman N. Schwartz, of counsel), *for Appellant Trane.*

JACK HART (Hart & Hume, New York, New York), *for Appellees.*

HAYS, *Circuit Judge:*

Use-plaintiff The Trane Company appeals from a judgment of the United States District Court for the Southern District of New York, Lloyd F. MacMahon, *Judge,* dismissing its complaint against defendants Benjamin Gelman, doing business as Gelco Builders, Burjay Construction Corporation, National Surety Corporation and The Hanover Insurance Company after trial without a jury in a suit under the Miller Act, 40 U. S. C. §§ 270a-270d (1964), against a prime contractor and its sureties. Defendant Raymar Contracting Co., defaulted by failing to appear and plead.

In March, 1960, defendant Gelco-Burjay entered into a contract with the federal government for the installation of an air-conditioning system at the General Post Office and Morgan Annex in New York City. Defendant National Surety Corporation and the Massachusetts Bonding and Insurance Company (succeeded by defendant The Hanover Insurance Company), as co-sureties, furnished a Miller Act payment bond on behalf of Gelco-Burjay, as principal, pursuant to 40 U. S. C. § 270a (1964). Gelco-Burjay made a subcontract with defendant Raymar to do a part of the work.

On April 19, 1960, Raymar, following negotiations with Jack Kliesrath, a salesman from Trane's New York City office, ordered certain air-conditioning equipment from Trane. Trane's principal place of business is in La Crosse, Wisconsin.

Trane delivered the equipment to the construction site by November 1, 1960 and thereafter billed Raymar for

the agreed price of $39,703.05. In January, 1961 Trane gave Gelco-Burjay a timely Miller Act ninety-day notice, pursuant to 40 U. S. C. § 270b(a) (1964), stating that this amount was due and owing from Raymar and that the last date of furnishing material was November 1, 1960.

In April 1961, Raymar defaulted on its subcontract and Gelco-Burjay undertook completion of Raymar's work. Gelman, as agent for Gelco-Burjay, telephoned Trane's New York office to inquire about purchasing electric motors to be used with the air-conditioning equipment. Trane does not manufacture electric motors. Gelman was referred to Kliesrath, met with him and gave him an order for electric motors on April 28, 1961. The contract provided that the notes were to be paid for upon receipt and that payment was to be made to "Long Island Trane Service Co.," under which name Kliesrath had filed a certificate of doing business. Without notifying Trane, Kliesrath ordered the motors from General Dynamics Corporation.

The last delivery of the motors was made on July 10, 1961. Kliesrath sent invoices to Gelco-Burjay totalling $3,235.00 for the motors on July 18, 1961. The invoices were on a billhead which read: "The Trane Company, Long Island Trane Service Co., 88 Cold Spring Road, Syosset, L. I., N. Y."; they specifically directed that all checks should be made payable to the "Long Island Trane Service Co." Gelco-Burjay immediately made payment by checks payable to "Long Island Trane Service Co." Kliesrath endorsed the checks and converted the proceeds to his own use.

Trane commenced this Miller Act suit on June 26, 1962. It seeks to recover both the purchase price of the air-conditioning equipment and the purchase price of the motors.

Section 270(b) of the Miller Act provides that a supplier may not commence a suit "after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him." The com-

mencement of this action was within one year after the last delivery by General Dynamics under the agreement for the purchase of the electric motors but more than one year after the last delivery by Trane of air conditioning equipment.

Trane argues that its suit is timely because the two agreements constituted a single contract. The evidence does not support Trane's theory.

The first agreement was made between Raymar and Trane, the parties to the second agreement were Gelco-Burjay and Kliesrath, or Kliesrath's alter ego, Long Island Trane Service Co. Trane was not even aware of Gelco-Burjay's purchase of the motors until long after the transaction took place. Kliesrath purchased the motors from General Dynamics Corporation without notifying Trane. Trane cannot now, for the purpose of reviving its contract with Raymar, claim to have been a party to Gelco-Burjay's contract to purchase motors from General Dynamics.

Trane argues that it became a party to the purchase of the motors by ratifying Kliesrath's activity.

The motors were purchased from Kliesrath who ordered them from General Dynamics Corporation and gave no notice to Trane. Payment was made to Kliesrath through his "Long Island Trane Service Co.," as provided in his contract with Gelco-Burjay. Trane did not learn of the contract until months after both the last delivery of the motors and the making of payment for them. Trane thus had no connection with the motors contract and it cannot now "ratify" a transaction to which it was an utter stranger.

In any event "ratification" would not aid Trane in its suit under the motors contract because Trane could not ratify Kliesrath's other activity without also ratifying his receipt of payment.

Affirmed.

KAUFMAN, *Circuit Judge* (dissenting):

Since I cannot agree with the majority's treatment of the ratification issue, which I believe determinative of the timeliness of Trane's claim for materials it supplied to Raymar, I must dissent. On the facts of this case, I am at a loss to understand the basis for the majority's conclusion that Trane was "an utter stranger" to the contract between Gelco-Burjay and Kliesrath. I believe it is quite clear that Trane involved itself because Kliesrath was permitted by Trane to hold himself out as one empowered to act for it in dealing with Gelco-Burjay. Not only was Kliesrath Trane's salesman, but as my brother Hays states, Trane's New York office referred Gelco-Burjay's agent to Kliesrath when he inquired about the purchase of motors from Trane. In addition, it seems obvious that Kliesrath's purpose in creating the "Long Island Trane Service Co." and directing that payment for the motors be made to it was to create the impression that he was indeed effecting the transaction on behalf of a subsidiary or division of the Trane Company—a notion reinforced by the circumstance that Trane did actually have a division similarly named "The New York Trane Service Company." And since Kliesrath had thus purported to act for Trane in selling the motors to Gelco-Burjay, and inasmuch as Trane clearly could have authorized the sale, as in the past it had authorized many similar transactions by its salesmen, I believe that Trane had the power to and did in fact and law ratify the sale by bringing this action for the purchase price of the motors.

I hasten to add that I agree that such ratification did not entitle Trane to recover the amount of its claim, since it would follow that in affirming the sale, it could not disavow the payments made by Gelco-Burjay to Kliesrath extinguishing the claim. A principal cannot selectively ratify only those portions of a transaction which would inure to its benefit. Restatement (Second) of Agency § 96 (1957). In short, it cannot have its cake and eat it too.

But, by its ratification in bringing the suit on its claim, Trane, as a consequence, became the supplier of the motors.

Under the Miller Act statute of limitations, 40 U. S. C. § 270(b), it seems clear to me that Trane's act of ratification fixed the date on which it supplied the last material for the government project as July 10, 1961, less than a year before it instituted this action. It should be noted also that the lower court determined that even if the ratification doctrine was applicable, Trane's claim for the materials it had supplied to Raymar was time barred because the judge interpreted the one year statute of limitations in § 270(b) as running from " 'the day on which the last of the material was supplied' *on each separate contract.*" I believe that this interpretation was erroneous and would lead to complexities which the history of the statute indicates Congress was trying to overcome. It is more in keeping with Congressional intent for us to construe the one-year limitation as running only once for each supplier on a job, commencing on the last day he supplied any material for work under the prime contract. See *United States of America for the use of General Electric Co.* v. *Southern Construction Co., Inc.*, 383 F. 2d 135 (5th Cir. 1967), cert. denied 390 U. S. 955 (1968). Not only does this result better comport with the literal language of § 270b(b), which contains no requirement that the time limit should run separately for each separate claim, as does § 270b(a) (dealing with the 90 day notice provision), but I believe it wiser doctrine. Otherwise, a materialman would be required to bring multiple suits to recover for materials which he supplied to a single project under separate contracts spread over several years. Piecemeal litigation is a plight to be avoided wherever feasible.

Accordingly, I believe that since Trane ratified the motors sale, it supplied materials for the project within a year of bringing suit. The action for equipment furnished to Raymar is timely, and I would reverse on this claim.

APPENDIX C

Pertinent Text of the Miller Act.

(40 U.S.C. § 270a-270b)

"270a. Bonds of contractors for public buildings or works; waiver of bonds covering contract performed in foreign country.

"(a) Before any contract, exceeding $2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor":

"(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

"(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $5,000,000 the said payment bond shall be in the sum of $2,500,000.

"(b) The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much of the work under such contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.

"(c) Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section. Aug. 24, 1935, c. 642, sec. 1, 49 Stat. 793.

* * * *

"270b. Same; rights of persons furnishing labor or material.

"(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed

and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope address to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

"(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him. The United States shall not be liable for the payment of any costs or expenses of any such suit. As amended Aug. 4, 1959, Pub. L. 86-135, § 1, 73 Stat. 279."

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SUPREME COURT, U. S.

MAR 6 1969

JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1119

UNITED STATES OF AMERICA, for the Use and Benefit of the TRANE COMPANY,

Petitioner,

against

[redacted] BENJAMIN GELMAN, doing business as GELCO BUILDERS, BURJAY CONSTRUCTION CORPORATION, NATIONAL SURETY CORPORATION AND THE HANOVER INSURANCE COMPANY,

Respondents.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HERMAN N. SCHWARTZ,
Attorney for Petitioner,
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New York, N. Y. 10005.

IRVING RONALD STORCH,
Of Counsel.

Opinion of District Court.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

62 Civ. 2245

UNITED STATES OF AMERICA, for the use and benefit of THE TRANE COMPANY,

Plaintiff,

against

RAYMAR CONTRACTING CORP., BENJAMIN GELMAN, doing business as GELCO BUILDERS, BURJAY CONSTRUCTION CORP., NATIONAL SURETY CORPORATION and THE HANOVER INSURANCE COMPANY,

Defendants.

MEMORANDUM

MACMAHON, *District Judge.*

This is an action under the Miller Act brought by a supplier of materials to a defaulting subcontractor on a post office project against the prime contractor and sureties. The question for determination is whether the action is time-barred under the one-year limitation provision of the Miller Act, 40 U.S.C. § 270b.

The court finds that the following facts were established upon the trial:

The use plaintiff, Trane, has its principal place of business in La Crosse, Wisconsin. At the times involved, it also had an office in New York which was staffed by a manager and eight salesmen, one of whom, Kliesrath,

worked both out of the New York office and an office located at Syosset, Long Island. Kliesrath negotiated with Raymar, a subcontractor, on a project where the prime contractor* had agreed to install a central air conditioning system at two New York post offices.

On April 19, 1960, Raymar gave a purchase order for Trane to supply air handling equipment, coils, and fans to Raymar. Trane did not manufacture electric motors, and there was no mention of them in the purchase order. Kliesrath dealt with Raymar on deliveries under the purchase order, and Trane had supplied all of the materials specified and delivered them to the construction site by November 1, 1960. Thereafter, Trane billed Raymar for the agreed price of $39,703.05 which Raymar failed to pay. The prime contractor also failed to pay after due notice in January 1961 of Raymar's failure to pay.

After Raymar's default, in April 1961, the prime contractor took over completion of Raymar's job. Gelman, as agent for the prime contractor, telephoned Trane's New York office to inquire about the purchase of electric motors to be used with the air conditioning equipment which had already been installed. He was referred to Kliesrath and met with him.

On April 28, 1961, Gelman gave Kliesrath an order for standard electric motors. Without authority from or notice to Trane, Kliesrath ordered the motors not from Trane but from General Dynamics Corporation. That company delivered the motors to the construction site, making the last delivery on July 10, 1961. All of the motors were consigned to Raymar.

On July 18, 1961, Kliesrath sent invoices to the prime contractor totalling $3,235.00 for the motors. The invoices

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* Defendant Benjamin Gelman, doing business as Gelco Builders, and Burjay Construction Corp., a joint venture, are collectively referred to in this memorandum as "the prime contractor."

were on the following billhead: "The Trane Company, Long Island Trane Service Co., 88 Cold Spring Road, Syosset, L. I., N. Y.", and specifically directed that all checks be made payable to the "Long Island Trane Service Co." The prime contractor immediately made payment of the invoices by its checks payable to the "Long Island Trane Service Co." Kliesrath endorsed the checks and coverted the proceeds to his own use. Kliesrath was not authorized by Trane to set up the Long Island Trane Service Co., nor to enter into the motor transaction.

This action for recovery of both the purchase price on the air handling equipment, coils, and fans ($39,703.05) and the motors ($3,235.00) was commenced against the prime contractor and the surety on June 28, 1962 and June 29, 1962, respectively. Defendants contend that the action is time-barred.

The Miller Act, 40 U.S.C. § 270b, provides that "no suit [by a use plaintiff] shall be commenced after the expiration of one year after the day on which the last of . . . the material was supplied by [the use plaintiff]." Whether the action is timely brought turns on whether "the day on which the last of the material was supplied by [the use plaintiff]" was July 10, 1961, the last delivery of a motor, or November 1, 1960, the last delivery of a coil or fan. Defendants contend that the motor transaction was an entirely separate transaction and therefore that the delivery of the last motor on July 10, 1961 was not a delivery under the contract between Trane and Raymar. Plaintiff contends that it ratified Kliesrath's unauthorized contract to supply motors and that the last delivery of a motor on July 10, 1961 was therefore the last date of delivery of material under the contract between Trane and Raymar.

If the two agreements, one in April 1960, the other in April 1961, are part of one contract, then it is clear that this action was timely commenced. If the two agreements

are in fact two separate contracts, then the claim as to $39,703.05 is time-barred, since an action must be commenced within one year of the "day on which the last of the material was supplied" on each separate contract.

In *United States for Use and Benefit of J. A. Edwards & Co.* v. *Peter Reiss Const. Co.*, 273 F.2d 880 (2 Cir. 1959), *cert. denied*, 362 U. S. 951 (1960), the court held that notices of nonpayment by a subcontractor had to be given by a materialman within 90 days of the last delivery of materials on each separate contract. 40 U.S.C. § 270b(a). Other courts have held that the day which fixes the time when the 90-day period for giving notice starts to run also fixes the time when the one-year period for filing suit starts to run. *United States for Use and Benefit of Austin* v. *Western Electric Co.*, 337 F. 2d 568, 572 (9 Cir. 1964); *United States for Use and Benefit of Taykinswell, Inc.* v. *Bencon Const. Co.*, 248 F. Supp. 502, 506 (D. Md. 1965), *aff'd on opinion below*, 369 F.2d 405 (4 Cir. 1966).

We now consider whether the two agreements were in fact separate contracts, or one interrelated contract. It is well settled that the factors to be considered in answering this question are: the time and place of acceptance, the time and place of performance, and the character of the performance. Corbin, Contracts ¶696 (rev. ed. 1961). Applying these criteria to the facts of this case, we find two separate contracts for the agreement to supply air handling equipment, coils and fans is separate and distinct from the agreement to purchase motors.

The first agreement, between Trane and Raymar, was made in April 1960; the second, between Trane and the prime contractor, was made one year later. Performance of the first agreement was fully completed by November 1,

1960.* Performance of the second agreement was not completed until seven months later, in July 1961.

The first agreement called for Trane to manufacture the goods to specification. The second agreement called for stock items, electric motors, which Trane had to order from outside manufacturers because it did not manufacture them itself.

Finally, the parties to the agreements are different.

Trane introduced no evidence showing that the two agreements are interrelated in any way, or that the second was contemplated by either party at the time of the first.

General Electric Co. v. *Southern Const. Co.*, 383 F. 2d 135 (5 Cir. 1967), which Trane cites, is inapposite. There the successive agreements between the materialman and the subcontractor and the prime contractor were parts of one contract, not separate contracts.

Accordingly, we hold that this action commenced in July 1962, for $39,703.05, the price of materials supplied under a separate contract of April 1960 upon which the last date of delivery was November 1, 1960, is time-barred and must be dismissed.

Trane also claims $3,235.00 for the motors which the prime contractor ordered in April 1961 from Long Island Trane Service Co. As we have seen, that contract was made by Kliesrath without authority. Trane now purports to ratify it. Admittedly, the prime contractor paid $3,235.00 to Long Island Trane Service Co., a fictional entity which Kliesrath set up to deal with the prime contractor.

The contract between Kliesrath and the prime contractor provided that the motors were to be paid for upon receipt, and that payment was to be made to Long Island Trane

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* Trane so stated in its 90-day letter to the prime contractor informing it of Raymar's failure to pay.

Service Co. Those two conditions were part of the contract. It is well settled that "a contract . . . must be affirmed in its entirety in order to effect its ratification." Restatement of Agency 2d § 96. Trane cannot pick and choose what it will accept of the contract it purports to ratify. It must take the burdens with the benefits. It cannot, therefore, affirm its disloyal agent's sale and disavow his receipt of the purchase price. If it ratifies, it must ratify the whole contract, and, in that case, the prime contractor has paid for the motors and is not indebted to Trane.

The foregoing constitutes the court's findings of fact and conclusions of law, as required by Fed. R. Civ. p. 52(a).

The Clerk of the court will be ordered to enter judgment dismissing plaintiff's complaint with costs and disbursements of the action to defendants National Surety Corporation and The Hanover Insurance Company. Submit judgment on notice within ten (10) days of the filing of this memorandum.

Dated: New York, N. Y., February 5, 1968.

LLOYD F. MACMAHON,
Lloyd F. MacMahon,
United States District Judge.

SUPREME COURT, U. S.

FILED

MAR 28 1969

JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1968

No. 1119

UNITED STATES OF AMERICA, for the Use and Benefit of the TRANE COMPANY,

Petitioner,

against

[redacted]; BENJAMIN GELMAN, doing business as GELCO BUILDERS, BURJAY CONSTRUCTION CORPORATION, NATIONAL SURETY CORPORATION and the HANOVER INSURANCE COMPANY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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10 East 40th Street
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Supreme Court of the United States

October Term, 1968

No. 1119

UNITED STATES OF AMERICA, for the Use and Benefit of the TRANE COMPANY,

Petitioner,

against

RAYMAR CONTRACTING CORP., BENJAMIN GELMAN, doing business as GELCO BUILDERS, BURJAY CONSTRUCTION CORPORATION, NATIONAL SURETY CORPORATION and the HANOVER INSURANCE COMPANY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Questions Presented

1. Was the Court of Appeals in error in affirming the judgment of the District Court holding that there was not a "ratification" by use-plaintiff of a certain contract on which it sought to rely?

2. Assuming *arguendo* that the Court of Appeals and the District Court were in error as to "ratification" and that therefore use-plaintiff may rely on the allegedly "ratified" contract, what construction should be given, on the facts that would then be presented, to the one-year limitation provision of the Miller Act (40 U.S.C. §270(b)? The majority opinion of the Court of Appeals did not reach the question of statutory construction and accordingly made no mention of it.

Statement of the Case

Although respondents in several respects do not concur with petitioner's Statement of the Case, it is respectfully believed that at this juncture, treating solely with the question of the granting of certiorari, it is not necessary to burden this brief with a counter-statement.

ARGUMENT

1. The decision of the Court of Appeals was in no way in conflict with applicable state law.

Petitioner's basic contention is stated in its brief in the words of Rule 19, *viz.*, that the Court of Appeals ". . . decided an important state . . . question in a way in conflict with applicable state . . . law". However, we respectfully submit that a reading of petitioner's brief on this point establishes that petitioner does not contend that the Court of Appeals was not fully and correctly aware of the state law relating to "ratification" of a contract. It is plain from petitioner's own brief that it is complaining merely that the findings of fact in the District Court and the Court

of Appeals were against the weight of the evidence and that these findings of fact should be reviewed by this Court. Respectfully, we submit that this does not present a "special or important reason" for granting the writ.

2. The Court of Appeals did not decide an important question of federal law.

It is not possible for petitioner even to state its second point in the words of Rule 19 because, as petitioner's brief acknowledges, the majority opinion of the Court of Appeals did not reach and therefore did not discuss, let alone decide, the alleged "important question of federal law which has not been, but should be, settled by this Court".

On this point, petitioner seems to be contending that if this Court grants the writ and reverses the factual findings of the lower courts, it should then also instruct the Court of Appeals for the Second Circuit as to the construction to be given to 40 U.S.C. §270b(b) even though that Court has not yet expressed itself on this subject. In this respect, it may be pertinent to note that no Court of Appeals has as yet construed 40 U.S.C. §270b(b) in a fact situation such as here would be presented if there had been a "ratification" found. There is therefore no conflict between circuits.

Conclusion

Respondents respectfully pray that the instant application for a writ of certiorari be denied.

Respectfully submitted,

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Attorney for Respondents